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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

BOB STUMP, Chairman

GARY PIERCE

BRENDA BURNS

ROBERT L. BURNS

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ORIGINAL

Arizona Corporation Commission

DOCKETED

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IN THE MATTER OF THE
APPLICATION OF ARIZONA PUBLIC
SERVICE COMPANY, PURSUANT TO
ARIZONA REVISED STATUTE § 40-
252, FOR AN AMENDMENT OF
ARIZONA CORPORATION
COMMISSION DECISION NO. 70850.

DOCKET NO. L-00000D-08-0330-00138

**LEGAL MEMORANDUM
REGARDING STANDARD
APPLICABLE TO COMMISSION'S
DETERMINATIONS WHEN
MODIFYING A CERTIFICATE OF
ENVIRONMENTAL
COMPATIBILITY**

I. INTRODUCTION

A procedural conference was held on October 5, 2014 regarding APS's Application to Amend Arizona Corporation Commission's ("Commission") Decision No. 70850 (March 17, 2009), which granted a Certificate of Environmental Compatibility ("CEC") (Decision No. 70850 and the corresponding CEC is collectively referred to as "CEC 138"). CEC 138 authorized APS to construct a 500/230kV transmission line from Morgan/TS5 substation to Sun Valley/TS9 substation. As

1 requested by Administrative Law Judge Sarah Harpring, Arizona Public Service
2 Company submits this legal memorandum addressing the legal standards applicable to
3 the Commission's determinations in amending CEC 138.

4 **II. DISCUSSION**

5 **A. CEC approved by the Commission under A.R.S. § 40-360.07 is a** 6 **Commission order that may be amended or modified under A.R.S.** 7 **§ 40-252.**

8 The Commission may amend or modify any order or decision made by it
9 pursuant to A.R.S. § 40-252. Section 40-252 states: "The Commission may at any time,
10 upon notice to the corporation affected, and after opportunity to be heard as upon a
11 complaint, rescind, alter or amend any order or decision made by it." A CEC granted by
12 the Arizona Power Plant and Transmission Line Siting Committee under A.R.S. § 40-
13 360.06 and affirmed and approved by the Commission under § 40-360.07 is a
14 Commission order that may be amended or modified under A.R.S. § 40-252.¹ Decision
15 No. 58793 at p. 7:13-14 (Sept. 21, 1994). Indeed, in Decision 58793, commonly
16 referred to as Whispering Ranch, the Commission has noted that "it is unrealistic to
17 think that the Legislature intended that no change to a planned transmission line after
18 issuance of a CEC should require a modification of the CEC." *See id.*, p. 23:1-3. The
19 Commission further noted that the legislative intent of the Siting Act provides "a strong
20 indication that substantial changes in such lines or generating plants after issuance of
21 CECs would have to be addressed by application for modifications of the CECs." *See*
22 *id.*, pp. 23:17-29, 24:1-4.

23 **B. Commission applies a public interest standard to determine whether** 24 **to approve a modification to a CEC.**

25 The Commission applies a public interest standard to determine whether to
26 approve modifications or amendments to a CEC. *Davis v. Ariz. Corp. Comm'n*, 96 Ariz.
27 215, 218, 393 P.2d 909, 911 (1964). The test used by the Commission is whether the

28 ¹ "There is longstanding precedent for the exercise by the Commission of its powers under A.R.S. § 40-252 in proceedings under the Siting Act [A.R.S. § 40-360 *et seq.*]." *See* Decision No. 58793 at p. 7:13-14 (Sept. 21, 1994).

1 public interest would be served by the change. *Id.* A review of Commission decisions
2 amending CECs illustrates the types of factors the Commission considers in reviewing
3 and amending a CEC. These are similar to the factors considered by the Commission in
4 granting a CEC.

5 In Decision No. 72680 (Nov. 17, 2011), the Commission considered a request to
6 modify a CEC to authorize the use of a second set of conductors and a transmission
7 structure not previously contemplated. In reaching its decision allowing the amendment,
8 the Commission considered factors that arose in the course of engineering the project,
9 such as identifying a location where the Gen-Tie line would encounter an existing line
10 and the presence of wastewater treatment ponds adjacent to the line crossing. *See id.*, p.
11 2:15-21. The Commission amended the decision and permitted Arizona Solar One, LLC
12 to install a second set of conductors and approved the use of new structures not
13 previously contemplated to cross under the existing transmission line and span the
14 adjacent wastewater treatment ponds. The Commission concluded that the proposed
15 change was in the public interest because the change would reduce line loss in the
16 transmission of electricity and improve reliability. *See id.*, p. 2:11-14.

17 On December 10, 2010, Diné Power Authority filed an Application for Extension
18 of CEC Term. In approving the term extension, the Commission considered factors
19 such as the changing economic conditions in the State, the changing nature of the
20 Southwest power market, improved operational flexibility and reliability of transmission
21 in the region, and increased economic power transfers, including from renewable
22 generation. *See* Decision No. 72007, p. 2:14-19. The Commission concluded that it was
23 reasonable and in the public interest to postpone construction of the transmission line
24 based upon these factors. *See id.*, p. 3:11-14.

25 Recently, the Commission applied the public interest standard to approve a
26 request by APS to approve (i) a term extension, (ii) a corridor change, and (iii) use of a
27 different type of transmission tower (a Y-frame instead of an H-frame structure). In
28

1 reaching its decision, the Commission considered whether the changes were
2 environmentally compatible, and the impact on reliability, load serving capability in the
3 affected area, and the cost of the changes. *See* Decision No. 74206, p. 4:5-13 (Dec. 3,
4 2013).

5 In Decision No. 73824 (April 10, 2013), the Commission granted APS's request
6 to modify the location of a substation and cancel a portion of the certificated
7 transmission line. In addition, the Commission granted APS a term extension. In its
8 decision, the Commission summarized the factors it considers when deciding whether
9 proposed modifications to a CEC are in the public interest. Specifically, the
10 Commission noted that it considers factors such as the effect of the change on the
11 transmission grid and the applicant's ability to serve its customers reliably, the impact to
12 the anticipated cost of the project, and the effect on safety. *See id.*, p. 6:22-26. The
13 Commission also considered whether the changes were environmentally compatible.
14 *See id.*, p. 7:9-11.

15 Here, the Commission will use similar factors to determine that APS's proposed
16 changes are in the public interest.

17 **C. Preponderance of the evidence standard of proof applies to actions**
18 **brought pursuant to A.R.S. § 40-252.**

19 The standard of proof applicable in this case is the preponderance of the
20 evidence.² APS has found no authority or precedent for applying a higher standard of
21 proof to decisions where the Commission is exercising its power to amend a CEC under
22 A.R.S. § 40-252.

23 The heightened clear and convincing evidence standard found in A.R.S. § 40-
24 254(E) is not applicable here. It applies only when a party commences an action in
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26 ² Ordinary civil cases are governed by the preponderance of the evidence (more probably true than not
27 true) for all claims except for those on which there are specific instructions mandating the standard of
28 clear and convincing evidence. *See* Standard 3, Burden of Proof, Clear and Convincing (Rev. Ariz. Jury
Instructions (Civil) 5th, July 2013); *see also In re Salt River Project*, Dec. No. 58793 (Sept. 21, 1994)
(applying a preponderance of the evidence standard).

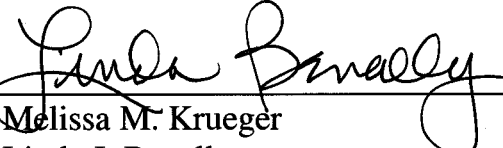
1 Superior Court to challenge a Commission order or decision.³ In such cases, the moving
2 party has the burden to show by clear and satisfactory evidence that the Commission's
3 order was unreasonable and unlawful. A.R.S. § 40-254(E). *See e.g., Grand Canyon*
4 *Trust v. Ariz. Corp. Comm'n*, 210 Ariz. 30, 33, 107 P.3d 356, 359 (Ariz. Ct. App. 2005).

5 APS's application involves the Commission's review and potential amendment of
6 its own prior order and not judicial review of a Commission decision by the Superior
7 Court. Accordingly, there is no reason to depart from the preponderance of the evidence
8 standard typically applied by the Commission.

9 **III. CONCLUSION**

10 For the reasons stated above, the Commission must apply the public interest
11 standard when determining whether to approve modifications to CEC 138. The
12 applicable burden of proof in this matter is the preponderance of the evidence standard.

13 RESPECTFULLY SUBMITTED this 3rd day of November 2014.

14
15 By: 
16 ~~Melissa M. Krueger~~
17 Linda J. Benally
18 Attorneys for Arizona Public Service
19 Company

20 ORIGINAL and thirteen (13) copies
21 of the foregoing filed this 3rd day of
22 November 2014, with:

23 Docket Control
24 ARIZONA CORPORATION COMMISSION
25 1200 West Washington Street
26 Phoenix, Arizona 85007

27 ...

28 ³ The party in interest is required to file within 30 days after a rehearing is denied or granted. A.R.S. § 40-254(A).

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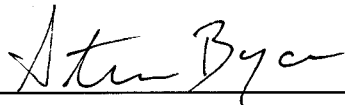
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